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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ZURICH AMERICAN INSURANCE
COMPANY,

Plaintiff and Appellant,

v.

COUNTY OF RIVERSIDE,

Defendant and Respondent.

E055841

(Super.Ct.No. RIC1110532)

O P I N I O N

APPEAL from the Superior Court of Riverside County. John Vineyard, Judge.

Affirmed.

Greenan, Pepper, Sallander & Lally and Robert G. Seeds for Plaintiff and
Appellant.

Arias & Lockwood and Christopher D. Lockwood for Defendant and Respondent.

I. INTRODUCTION

Plaintiff and appellant, Zurich American Insurance Company (Zurich), appeals a judgment entered in favor of defendant and respondent, County of Riverside (the County), after the trial court sustained the County's general demurrer to Zurich's second amended complaint against the County without leave to amend. The complaint asserts causes of action for breach of contract, interference with contractual relations, interference with prospective economic advantage, and declaratory relief.

The gravamen of Zurich's claims is that the County wrongfully "impaired" Zurich's subrogated right against Lim Nascimento Engineering Corp. (LAN), to collect from LAN over \$377,000 in attorney fees and costs Zurich paid to defend the County in a personal injury action by John and Sarah McLauchlin (the McLauchlin action). Zurich claims the County is therefore liable to Zurich for the defense costs that Zurich is unable to collect from LAN.

For the reasons we explain, the complaint does not state a cause of action against the County. Nor is there a reasonable probability that Zurich can allege additional facts constituting a cause of action against the County. In sum, nothing the County did or did not do breached the terms of the insurance contract pursuant to which Zurich paid the County's defense costs, or wrongfully impaired or prevented Zurich from enforcing its subrogated defense costs claim against LAN. We therefore affirm the judgment.

II. BACKGROUND

A. *The McLauchlin Action*¹

John McLauchlin was seriously injured when the motorcycle he was riding went off the road and crashed on Bridge Street, a County-owned roadway. At the time of the accident, traffic heading eastbound on Gilman Springs Road was being detoured southbound onto Bridge Street while the County made improvements to Gilman Springs Road. In addition to the County, John McLauchlin sued Yeager, the County's general contractor on the Gilman Springs Road improvement project, and LAN, the County's design engineer on portions of the project.

Mr. McLauchlin claimed the County, Yeager, and LAN were responsible for maintaining dangerous conditions on the Bridge Street detour, because traffic was detoured onto Bridge Street "without conducting traffic engineering for the detour" and also because they failed to install or maintain proper signs and roadway markings on the

¹ The facts described in this section are taken from the allegations of Zurich's second amended complaint and court records judicially noticed by the trial court. The trial court took judicial notice of certain records of the McLauchlin action, Riverside County Superior Court case No. RIC425702. (Evid. Code, § 452, subd. (d).) These records consisted of the County's cross-complaint, the judgment against the County on the cross-complaint, and the trial court's statement of decision on the cross-complaint.

The trial court properly did not take judicial notice of the truth of factual findings or hearsay statements in the court records, and neither do we. Instead, the records are judicially noticed to the extent they describe the claims asserted in the McLauchlin action and how those claims were resolved. (See *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482-483; *Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 130, fn. 7.)

detour. John's wife Sarah McLauchlin asserted a derivative claim against the County, Yeager, and Lan for loss of consortium.

Zurich was Yeager's comprehensive general liability (CGL) insurance carrier. The County was an additional insured on Yeager's CGL policy with Zurich pursuant to Yeager's construction contract with the County on the Gilman Springs Road project. The County tendered its defense of the McLauchlin action to Zurich, and Zurich agreed to defend the County while reserving its right to claim it was not obligated to defend or indemnify the County against the McLauchlins' claims. The County also tendered its defense of the McLauchlin action to LAN, but LAN refused to defend or indemnify the County. LAN's engineering contract with the County only required it to defend and indemnify the County against claims arising out of LAN's work for the County, and LAN claimed its work for the County did not involve conducting traffic engineering studies or installing or maintaining signs and roadway markings on the detour route.

The County cross-complained against both Yeager and LAN in the McLauchlin action, claiming they were each obligated to defend and indemnify the County from the McLauchlins' claims pursuant to their respective contracts with the County. Trial on the McLauchlins' complaint was severed from trial on the County's cross-complaint. Before the trial on the complaint, Yeager obtained summary judgment on the complaint and LAN entered into a good faith settlement with the McLauchlins for \$150,000. (Code Civ. Proc., § 877.) In January 2010, the McLauchlins proceeded to trial solely against the

County. During jury deliberations, the County agreed to pay the McLauchlins \$500,000 to settle their personal injury claims against the County.

In January 2010, before trial on the McLauchlins' complaint against the County, Zurich wrote a letter to the County advising the County that Zurich was subrogated to the County's contractual indemnity claim against LAN to the extent the County was seeking to recover its defense costs from LAN.² The letter stated that Yeager's insurance policy with Zurich, pursuant to which Zurich had paid for the County's defense costs, provided, in pertinent part, that: "If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing to impair them. At our request, the insured will bring 'suit' or transfer those rights to us and help us enforce them."

The letter also advised the County that it was "very important" that the County's cross-complaint against LAN "*not be dismissed with prejudice or compromised without Zurich's consent*," because if it were then Zurich's subrogated defense costs claim "could be impaired." Finally, the letter stated that Zurich's subrogated claim for defense costs had to be sought in the trial of the County's cross-complaint against LAN, because the "County and Zurich cannot split the contractual indemnity cause of action" between indemnity and defense costs.

A bench trial on the County's cross-complaint against Yeager and LAN began in May 2010, after the County settled the McLauchlins' claims for \$500,000 during jury

² The letter is attached to Zurich's second amended complaint as exhibit A.

deliberations. In the cross-action, the trial court found that neither Yeager nor LAN had a duty to defend or indemnify the County against the McLauchlins' claims. As between the County and Yeager, the court found that the County was *solely* negligent in causing Mr. McLauchlin's injuries. (Civ. Code, § 2782, subd. (a).) Regarding LAN, the court found that the McLauchlins' claims did not arise from LAN's work for the County because LAN was not required to provide and did not provide any traffic engineering studies for the detour or place or maintain any signs or other road markings on the detour.

Zurich moved to intervene in the cross-action *after* trial on the cross-complaint concluded but before the trial court issued its statement of decision and entered judgment in favor of Yeager and LAN. In its motion, Zurich complained that the County, without informing Zurich, abandoned Zurich's subrogated defense costs claim against LAN. Zurich argued that if it were not allowed to intervene in the cross-action and at least brief the issue of whether LAN was obligated to pay the County's defense costs, then Zurich would be bound by any judgment against the County on the subrogated defense costs claim based on principles of collateral estoppel and res judicata.

The trial court denied Zurich's motion to intervene on the grounds it was untimely and prejudicial to LAN. Zurich appealed from the order denying its motion to intervene in the cross-action, and the County appealed from the judgment in favor of Yeager and LAN on the County's cross-complaint. The appeals were consolidated and were pending on January 4, 2012, when the trial court sustained the County's demurrer to Zurich's second amended complaint in the present action.

B. The Trial Court's Ruling on the County's Demurrer

In its second amended complaint, Zurich asserted four causes of action against the County: breach of contract, negligent interference with contract, negligent interference with prospective economic relations, and declaratory relief. The gravamen of the claims is that the County wrongfully “impaired” Zurich’s subrogated right against LAN to collect from LAN over \$377,000 in attorney fees and costs Zurich paid to defend the County in the McLauchlin action.

The trial court sustained the County’s general demurrer to the complaint without leave to amend following a January 4, 2012, hearing. Regarding Zurich’s first cause of action for breach of contract, the court pointed out that Zurich had cited no authority to support its claim that the County had a contractual obligation, as an additional insured on Yeager’s CGL policy with Zurich, to inform Zurich that it would not be pursuing Zurich’s subrogated defense costs claim against LAN in the McLauchlin cross-action. The court also noted that the County had no claim for damages against LAN in its own right because Zurich, not the County, paid the County’s defense costs in the McLauchlin action.

Regarding Zurich’s second cause of action for “negligent” interference with contract, the court pointed out that there was “no such cause of action.” The court also noted that a claim for *intentional* interference with contract requires a contract with a third party, and Zurich did not allege that the County interfered with any contract between Zurich and a third party. The court sustained the County’s demurrer to Zurich’s

third cause of action for negligent (or intentional) interference with contractual relations on the same ground—Zurich did not allege that the County interfered with Zurich’s prospective economic relationship with any third party. Finally, the court sustained the County’s demurrer to Zurich’s claim for declaratory relief because it was based on “the same facts and issues raised in the first three causes of action.”

C. Zurich’s Request for Judicial Notice of Additional Court Records

Zurich requests that this court take judicial notice of court records generated after January 4, 2012, when the trial court sustained the County’s demurrer to Zurich’s second amended complaint. These consist of this court’s opinion in the consolidated appeals in the McLauchlin action (*County of Riverside v. Yeager Skanska, Inc.* (Nov. 27, 2012, E52034, E052439) [nonpub. opn.]) (*County v. Yeager*)) and records and minute orders issued in a federal district court action in which Zurich sued LAN on Zurich’s subrogated claim for defense costs (*Zurich American Ins. Co. v. Lim & Nascimento Engineering Corp.* (CV 12-01475-RGK (OPx) (*Zurich v. LAN*)).³

We grant the request. (*Arce v. Kaiser Foundation Health Plan, Inc., supra*, 181 Cal.App.4th at p. 482 [appellate court may take judicial notice of state and federal court records]; Evid. Code, §§ 452, subd. (d), 459, subd. (a).) “““Matters that cannot be brought before the appellate court through the record on appeal (initially or by augmentation) may still be considered on appeal by judicial notice.”” [Citation.]”

³ The parties’ briefs on this appeal were filed before this court issued its opinion in *County v. Yeager* and before the records in *Zurich v. LAN* were generated.

(*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 193.) An order sustaining a demurrer may be upheld on a ground not considered by the trial court “““as long as it comes within the four corners of the demurrer, namely, a failure to state a cause of action.”” [Citations.]” (*Gabriel v. Wells Fargo Bank, N.A.* (2010) 188 Cal.App.4th 547, 556.)

Finally, this court’s opinion in *County v. Yeager* and the subject records and minute orders in *Zurich v. LAN* are *relevant* to the issues raised on this appeal (cf. *Arce v. Kaiser Foundation Health Plan, Inc., supra*, 181 Cal.App.4th at p. 482 [court may decline to take judicial notice of matters not relevant to dispositive issues on appeal]), though they are not necessary to our disposition of this appeal for the reasons we explain in our discussion below of Zurich’s claims on this appeal. At this juncture, we describe the content of the additional court records.

1. County v. Yeager

In *County v. Yeager*, this court concluded that the trial court in the McLauchlin action properly denied Zurich’s motion to intervene in the County’s cross-action against LAN on the grounds that the proposed intervention was untimely and prejudicial to LAN. As noted, Zurich sought to intervene in the cross-action, after the bench trial on the cross-action had concluded, for the sole purpose of briefing whether LAN had a duty to defend the County in the McLauchlin action.

In affirming the order denying Zurich’s motion to intervene, we explained that Zurich was aware of the County’s cross-complaint from its inception but made no

attempt to intervene in the cross-action until after trial on the cross-complaint concluded—even though Zurich received no assurances from the County that the County would pursue Zurich’s subrogated defense costs to LAN.

We also concluded that substantial evidence supported the trial court’s finding that allowing Zurich to intervene following the trial on the cross-complaint would have been prejudicial to LAN, because LAN would have incurred additional attorney fees and costs in defending Zurich’s defense costs claim, and Zurich’s late intervention would have substantially delayed resolution of the cross-action.

Also in *County v. Yeager*, this court affirmed the judgment against the County on its cross-complaint for contractual indemnity against LAN in the McLaughlin action. On that appeal, the County argued that the trial court erroneously ruled that LAN had no duty to indemnify the County for the \$500,000 sum the County paid to settle the McLaughlins’ claims.

On that appeal, the County did not challenge the trial court’s conclusion that LAN’s duty to defend and indemnify the County in the McLaughlin action was limited to claims arising out of LAN’s work for the County, as set forth in LAN’s engineering contract with the County, and the scope of LAN’s work for the County on the Gilman Springs Road project did not require LAN to perform any traffic engineering studies or install or maintain signs or other roadway markings on the Bridge Street detour. As indicated, the McLaughlins’ personal injury claims arose from the failure to conduct

traffic engineering studies on the Bridge Street detour, or install proper signs and roadway markings on the detour.

2. Zurich v. LAN

In *Zurich v. LAN*, Zurich sued LAN directly, claiming that LAN was obligated to defend the County against the McLauchlins' claims in the McLauchlin action based on LAN's engineering contract with the County. Zurich asserted claims against LAN for subrogation and equitable contribution. After this court's November 27, 2012, opinion in *County v. Yeager* became final, the court in *Zurich v. LAN* issued an order to show cause directing Zurich and LAN to brief whether Zurich's complaint against LAN should be dismissed based on principles of "res judicata and/or collateral estoppel."

In a four-page minute order issued on March 11, 2013, the court in *Zurich v. LAN* concluded that Zurich was bound by this court's opinion in *County v. Yeager* affirming the judgment in favor of LAN on the County's cross-complaint. The court ultimately concluded that Zurich's subrogation and equitable contribution claims against LAN were barred based on principles of res judicata and collateral estoppel.

The court in *Zurich v. LAN* reasoned that Zurich was subrogated to the County's defense costs claim against LAN, Zurich's rights were "purely derivative of the County's," and Zurich was a party in privity with the County in the McLauchlin cross-action. The court further reasoned that the County's contractual indemnity claim against LAN "included both indemnification of liability and indemnification of defense costs"; that LAN's duty to indemnify and duty to defend the County were "sufficiently

intertwined and involve much the same analysis”; and that the trial court in the McLauchlin action “appropriately addressed the duties under one analysis, and determined that [the McLauchlins’] claims . . . never triggered the indemnification provision, as a whole.”

III. DISCUSSION

A. *Standard of Review*

“In reviewing an order sustaining a demurrer, we assume the truth of all well-pleaded material facts, as well as those facts that may be implied or inferred from the express allegations. [Citation.] We consider as well any matters that may be judicially noticed. [Citation.] We then determine de novo whether the allegations stated any cause of action as a matter of law. [Citation.] Where, as here, the demurrer is sustained without leave to amend, we determine if necessary whether the plaintiff established a reasonable possibility that the defect in the complaint could be cured by amendment. [Citation.]” (*Interstate Fire & Casualty Ins. Co. v. Cleveland Wrecking Co.* (2010) 182 Cal.App.4th 23, 31.)

B. *The County’s General Demurrer Was Properly Sustained Without Leave to Amend*

Zurich claims its second amended complaint adequately states causes of action against the County for (1) breach of contract, (2) negligent interference with contractual relations, (3) negligent interference with prospective economic advantage, and (4) declaratory relief. We discuss each cause of action in turn.

1. Breach of Contract

The elements of a cause of action for breach of contract are: “(1) the existence of the contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) the resulting damages to the plaintiff.” (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

Zurich argues that, as an additional insured on Yeager’s CGL policy with Zurich, the County was a party to Zurich’s insurance policy with Yeager and was therefore bound by its terms, including its “recoveries provision.” The “recoveries provision” states: “If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. *The insured must do nothing to impair them. At our request, the insured will bring ‘suit’ or transfer those rights to us and help us enforce them.*” (Italics added.) In addition, Zurich argues that, by abandoning the defense costs portion of its cross-complaint for indemnity against LAN, and only pursuing LAN for the \$500,000 sum the County paid to settle the McLauchlins’ claims, the County breached its obligation *not to impair* Zurich’s subrogated right to recover from LAN the over \$377,000 in defense costs that Zurich paid to defend the County in the McLauchlin action.

The County argues that, as an additional insured on Yeager’s CGL policy with Zurich, it was a third party beneficiary to the policy, not a party to it, and was therefore not bound by the policy’s “recoveries provision.” And even if it was bound by the recoveries provision, the County argues that it had no right to recover the defense costs

from LAN *in the County's own right* because Zurich paid those costs, the County did not. Thus, the County argues, Zurich cannot show it suffered any damages as a result of the County's failure to pursue Zurich's subrogated defense costs claim against LAN. The County also claims it had no obligation to inform Zurich that the County would not be pursuing Zurich's subrogated defense costs claim against LAN before trial commenced on the cross-complaint against LAN.

Assuming that the County, as an additional insured, was bound by the recoveries provision in Yeager's insurance policy with Zurich, we conclude that Zurich cannot show it was damaged by the County's failure to pursue Zurich's subrogated defense costs claim against LAN in the County's own right and without Zurich's intervention, as Zurich wanted the County to do. We also agree that the County had no obligation to inform Zurich, before trial on the County's cross-complaint against LAN, that the County would not be pursuing the defense costs claim against LAN.

As a matter of law, Zurich was equitably subrogated to the County's defense costs claim against LAN because Zurich paid the County's defense costs in the McLauchlin action. (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1291-1292.) This means that Zurich *succeeded* to the rights of the County to pursue the defense costs claim against LAN. (*Ibid.*) The recoveries provision of Yeager's policy affirms Zurich's equitable subrogation rights in that it states: "If the insured has rights to recover all or part of *any payment we have made . . . those rights are transferred to us. . . .*" (Italics added.)

In addition, the County did not incur any damages as a result of LAN's failure to pay the County's defense costs—precisely because Zurich paid the County's defense costs in the McLauchlin action, the County did not. (*Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1089.) Thus, if the County had pursued Zurich's subrogated defense costs claim in the McLauchlin cross-action *in the County's own right and without Zurich's intervention as Zurich wanted the County to do*, then the County would have lost the defense costs claim because it would not have been able to prove the damages element of the claim. (*Ibid.*)

Accordingly, Zurich cannot show that it suffered any damages as a result of the County's failure to pursue Zurich's subrogated defense costs claim against LAN in the County's *own right and without Zurich's intervention as Zurich wanted the County to do*. At the very least, Zurich cannot plead or prove the causation or damages elements of its breach of contract claim against the County.

Nor did the County have an obligation under the recoveries provision of Yeager's policy with Zurich to inform Zurich that it would not be pursuing the defense costs claim against LAN. Nothing in the recoveries provision required "the insured" to inform Zurich that it would not be pursuing Zurich's subrogated defense costs claim. The recoveries provision required the insured to (1) do nothing to impair Zurich's subrogation rights, (2) help Zurich enforce those rights, and (3) at Zurich's request, bring suit to enforce those rights. Zurich did not ask the County to bring suit against LAN to enforce Zurich's subrogated defense costs claim. The County brought the cross-complaint on its

own behalf to recover the \$500,000 sum the County paid to settle the McLauchlins' claims against the County. Further, the County's pursuit of LAN to recover the \$500,000 sum did not "impair" Zurich's subrogated defense costs claim.

Importantly, Zurich did not seek to intervene in the McLauchlin cross-action until after the trial concluded on the County's cross-complaint. To be sure, Zurich believed that the County would be pursuing Zurich's subrogated defense costs claim against LAN in the County's own right, and without Zurich's intervention. But Zurich reasonably should have known that the County would be unable to recover the defense costs from LAN in the County's own right and without Zurich's intervention. And the County did nothing to discourage or prevent Zurich from seeking to intervene in the cross-action earlier, before trial commenced. In these circumstances, Zurich cannot blame the County for Zurich's decision not to seek to intervene in the cross-action before trial.

In sum, any "impairment" of Zurich's subrogated defense costs claim against LAN—including this court's opinion in *County v. Yeager* affirming the judgment against the County on its cross-complaint against LAN, or the federal district court's decision in *Zurich v. LAN* concluding that Zurich was collaterally estopped from pursuing its subrogated defense costs claim against LAN—was a result of Zurich's actions and inactions, not the County's.⁴

⁴ Zurich requests that this court take judicial notice of its November 10, 2010, order in case No. E052034, dismissing that part of Zurich's notice of appeal purporting to appeal from the judgment against the County in the McLauchlin cross-action, as opposed to the order denying Zurich's motion to intervene in the cross-action. We grant the request. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) We dismissed Zurich's appeal

[footnote continued on next page]

Zurich argues it is error to sustain the County's demurrer on the ground that the County did not pay its own defense costs. Zurich points out that "[i]t is not a prerequisite to equitable subrogation that the subrogor [here, the County] suffered actual loss; it is required only that he would have suffered loss had the subrogee [here, Zurich] not *discharged the liability or paid the loss.*" (Fortman v. Safeco Ins. Co. (1990) 221 Cal.App.3d 1394, 1400.)

This argument confuses Zurich's equitable right to be subrogated to the County's defense costs claim with the County's inability to pursue LAN for the defense costs in its own right because the County did not "suffer the loss" of paying the defense costs. As indicated, Zurich is subrogated to the County's defense costs claim because it paid the County's defense costs. (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, *supra*, 65 Cal.App.4th at pp. 1291-1292.) But the County's failure to pay the defense costs was not a bar to an action by Zurich on Zurich's subrogated defense costs claim against LAN. (*Interstate Fire & Casualty Ins. Co. v. Cleveland Wrecking Co.*, *supra*, 182 Cal.App.4th at p. 34 [insurer subrogated to insured's defense costs claim against third party because the insurer paid the insured's defense costs].)

[footnote continued from previous page]

from the judgment in the McLauchlin cross-action because Zurich was not a party to and therefore did not have standing to appeal from the judgment on the McLauchlin cross-action.

2. Interference with Contract and Prospective Economic Advantage

As the trial court pointed out in sustaining the County's demurrer without leave to amend to Zurich's second amended complaint, there is no cause of action for "*negligent*" interference with contract, the caption of Zurich's second cause of action. Nor is there any cause of action for "negligent" interference with prospective economic advantage, the caption of Zurich's third cause of action.

There is, however, a cause of action for *intentional* interference with contractual relations (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1149) and *intentional* interference with prospective economic advantage (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153). A cause of action for intentional interference with contractual relations requires the plaintiff to plead and prove: "(1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Reeves v. Hanlon, supra*, at p. 1148.)

Similarly, a cause of action for *intentional* interference with prospective economic advantage requires the plaintiff to show: ""(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the

relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.” [Citations.]’ [Citation.]” (*Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th at p. 1153.)

As indicated, the gravamen of Zurich’s breach of contract *and* tortious interference claims is that the County interfered with, impaired, or undermined Zurich’s subrogated right to recover its defense costs from LAN “under the County-LAN contract” by failing to pursue Zurich’s subrogated defense costs claim in the County’s cross-complaint against LAN. Zurich is unable to plead or prove that it suffered any damages as a result of the County’s failure to pursue Zurich’s subrogated defense costs claim against LAN, however, for the reasons discussed.

3. Declaratory Relief

In its fourth cause of action for declaratory relief, Zurich alleges that it “contends that, in the event that the judgment entered in the [McLauchlin action] prevents Zurich from recovering from LAN, County would because of its impairment of Zurich’s subrogation rights and breach of the [recoveries provision in Yeager’s insurance contract with Zurich] be liable to Zurich for the full amount that Zurich should have been able to recover from LAN absent County’s actions and inaction Zurich is informed and believes, and thereupon alleges, that County disagrees. Therefore a dispute has arisen, and it is necessary for this Court to resolve this dispute.”

“““The fundamental basis of declaratory relief is the existence of an *actual, present controversy* over a proper subject.”” (*City of Cotati v. Cashman* (2002) 29

Cal.4th 69, 79) The court may sustain a demurrer on the ground that the complaint fails to allege an actual or present controversy, or that it is not ‘justiciable.’ The court also may sustain a demurrer without leave to amend if it determines that a judicial declaration is not ‘necessary or proper at the time under all the circumstances.’ (Code Civ. Proc., § 1061; see *Wilson v. Transit Authority* (1962) 199 Cal.App.2d 716, 721)” (*DeLaura v. Beckett* (2006) 137 Cal.App.4th 542, 545.)

A judicial declaration of Zurich’s rights, vis-à-vis the County concerning Zurich’s subrogated defense costs claim, was not “necessary or proper at the time under all the circumstances.” (Code Civ. Proc., § 1061) As the trial court pointed out, Zurich’s cause of action for declaratory relief is based on the same theory of recovery alleged in Zurich’s first three causes of action. Zurich claims the County is liable to Zurich for the defense costs Zurich paid to defend the County in the McLauchlin action because the County impaired or undermined Zurich’s ability to collect on its subrogated defense costs claim by failing to pursue the defense costs claim against LAN, and by failing to inform Zurich that it would not be pursuing the defense costs claim. For the reasons discussed, Zurich’s claims are untenable because nothing the County did or did not do impaired Zurich’s right or ability to pursue its defense costs claim against LAN.

IV. DISPOSITION

The judgment in favor of the County on Zurich’s second amended complaint is affirmed. The County shall recover its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.